



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Falcon Microsystems, Inc.

File: B-242555

Date: February 20, 1991

Paralee White, Esq., and Andrew Mohr, Esq., Cohen & White, for the protester.

Claude P. Goddard, Jr., Esq., Jenner & Block, for Sears, Roebuck and Co., and Carleton S. Jones, Esq., Shaw, Pittman, Potts & Trowbridge, for Sysorex Information Systems, Inc., interested parties.

William Murphy for the Department of the Treasury.

Mary G. Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office (GAO) will not consider a protest where there are two pending appeals before the United States Court of Appeals for the Federal Circuit concerning the procurement and the Court's decision on either of the appeals could render any decision by GAO academic.

DECISION

Falcon Microsystems, Inc. protests the specifications in solicitation No. A-88-07, issued by the Department of the Treasury for its Departmental Microcomputer Acquisition Contract.

We dismiss the protest.

The RFP was initially issued in 1988 and, among other things, required that an offeror's proposed hardware be commercially available by November 28, 1988. Following the competition, Treasury awarded the contract to Sears, Roebuck and Co. in May 1990. Subsequently, Sysorex Information Systems, Inc., SMS Data Products Group, Inc., and Falcon protested to the General Services Administration Board of Contract Appeals (GSBCA or Board) that the equipment offered by Sears did not meet the requirements of the solicitation. The GSBCA sustained the protests and found that the contract award to Sears should be terminated. The GSBCA also directed Treasury to determine if its needs remained as stated in the RFP and, if so, to award the contract to the lowest-priced, fully

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compliant, responsible offeror. If, however, Treasury determined that its needs were different than those stated in the solicitation, Treasury was required to amend the solicitation and conduct another round of best and final offers (BAFO). Sears has appealed the Board's decision to the United States Court of Appeals for the Federal Circuit.

In response to the Board's decision, Treasury issued amendment Nos. 18 and 19 to the solicitation which in part establish different commerciality dates for the offered hardware. SMS again protested to GSBICA, complaining that Treasury's actions did not comply with the Board's initial decision, and arguing that it was entitled to the contract award. By decision dated October 23, 1990, the GSBICA denied SMS' protest. SMS has appealed the denial to the Court of Appeals for the Federal Circuit.

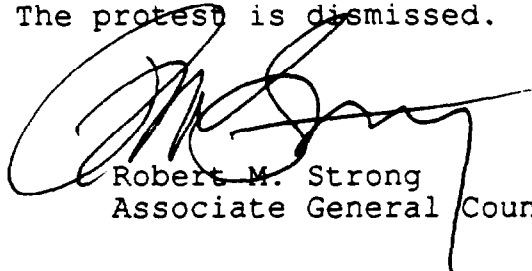
On January 8, 1991, Falcon submitted its protest to our Office. Falcon complains that Treasury improperly amended the RFP to provide for three different commerciality dates.

Even where the issues before a court are not the same issues which a protester is attempting to raise in our Office, if the court's disposition of a matter before it would render a decision by our Office academic, we will not consider the protest while the matter is pending before the court, unless the court expresses an interest in our opinion. See Bid Protest Regulations, 4 C.F.R. §§ 21.3(m)(6), (11) (1990); Electronic Sys. Assoc., Inc.--Recon., B-235323.2; B-235323.3, June 23, 1989, 89-1 CPD ¶ 596. Here, as noted above, both Sears and SMS have appeals pending before the Court of Appeals for the Federal Circuit. If the Court agrees with Sears' position on appeal that the GSBICA improperly ordered termination of the contract awarded to Sears, the Court could direct that the award to Sears be reinstated. Likewise, if the Court finds that the GSBICA properly ordered termination of the award to Sears, but that Treasury failed to comply with the rest of the Board's decision and should have awarded the contract to SMS, as SMS argues in its appeal, it could direct a contract award to SMS.

There thus are two court cases pending which directly concern the propriety of the procurement and could render any decision of our Office on the matter academic. Accordingly, we dismiss the protest because it is inappropriate for our Office to consider it at this time. See AT&T Technologies, Inc., B-221379, Jan. 24, 1986, 86-1 CPD ¶ 90. If, however, the Court denies the appeals of SMS and Sears, Falcon may refile its protest with our Office at that time. Id.

Falcon argues that the effect of our dismissal of its protest is to prevent the firm from having any forum in which to file its complaint. As an initial matter, we note that Falcon was free to pursue its complaint in court or before the Board rather than filing its protest with our Office. In any event, Falcon's argument ignores the fact that if the Court's decisions on the Sears and SMS appeals would permit our Office to render an effective decision--i.e., if the Court denies the appeals by Sears and SMS--Falcon may resubmit its protest. If, however, the Court's findings render a decision by our Office academic, our decision would provide no benefit to Falcon in any case.

The protest is dismissed.



Robert M. Strong
Associate General Counsel